IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

CR No. 282 of 2002

Reserved on: 19.7.2007 Decided on :August 6, 2007

Dhan Dev & others **..Petitioners.**

Versus

Manoj Kumar **….Respondent**

Coram:

The Hon'ble Mr Justice Surinder Singh,J.

Whether approved for reporting ?[1] *yes*

For the Petitioner: **Mr. Neel Kamal Sharma, Advocate.**

For the Respondent: **Mr. Ashwani K Sharma, Advocate.**

Surinder Singh,J.

The instant revision petition has been directed by the respondents hereinafter called the "defendants", feeling aggrieved and dissatisfied by the order passed in Civil Misc. Appeal No.27 of 2001 by the learned District Judge, Mandi, vide which the order passed in Civil Misc. Application No.44-vi/99/98 on 6.6.2001 passed by Sub Judge, whereby the application for bringing on record the

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment ? yes***

LRs of deceased-plaintiff was dismissed, consequently the suit was held have been abated.

Precisely, the facts are that Sh. Swami Dutt (since deceased) father of the appellant, hereinafter called as the "plaintiff" filed a suit against the defendants for seeking relief of declaration with a consequential relief of injunction with respect to the suit land, which was resisted and contested by the defendants, while denying the claim of the plaintiff, the suit was also contested on the ground of maintainability, limitation and estoppel.

The trial court had framed the issues on 30.6.1997, thereafter the matter was fixed for evidence of the plaintiff. During the pendency of the suit, plaintiff had died on 31.1.1998, as such an application under Order 22 Rule 3 and 9 of the Code of Civil Procedure for bringing on record the legal representatives of the deceased-plaintiff was filed by Manoj Kumar, respondent herein, on 24.9.1998, with a prayer to set aside the abatement, if any, of the suit. It was averred in the application that he was not aware of the suit, filed by his late father. He was serving in the Indian Army, it was only on 13.9.1998, when he came

on leave, he came to know from a co-villager that his father had filed a civil suit against the defendants. Thereafter, on 24.9.1998 on an inquiry, he had contacted the lawyer, who informed about the pendency of the suit and advised to move an application as aforesaid, which was duly supported by his affidavit.

The defendants offered a strong resistance to the said application and denied the averments made therein. According to the defendants, the applicant was negligent and there was no sufficient cause to condone the delay.

To decide the matter in controversy, the trial court had framed the following issues:

1. Whether there is sufficient cause to set aside the abatement? OPA
2. Whether the application is within time? OPA
3. Relief.

Parties led their evidence and after hearing the learned counsel for the parties, the trial court held that there was no sufficient cause to set aside the abatement, as the application was not filed within the period of limitation.

The aforesaid order was assailed in FAO No.197 of 2001 before this Court and this Court had observed that against the order aforesaid, appeal lies to the District Judge thus the memo of appeal was ordered to be returned to the plaintiff through his counsel to file the appeal in the court of District Judge concerned and the parties were directed to appear before the court of District Judge on 5.11.2001.

Learned District Judge heard the learned counsel for the parties, reappraised the evidence on record, while relying upon various judgments held that the impugned order passed by the trial court was not sustainable. Accordingly, the appeal was allowed and the impugned order dismissing the application aforesaid as well as the suit was set aside. Applicant Manoj Kumar was ordered to be brought on record as legal representative of the deceased-plaintiff Swami Dutt and the case was remanded to the trial court with a direction to proceed with the case on merits.

Now, the impugned order of the District Judge has been assailed in the present revision petition, on the ground that the learned District Judge has wrongly appreciated the evidence on

record and came to the wrong conclusion, therefore, the impugned order deserves to be set aside.

I have heard the learned counsel for the parties and have examined the record very carefully.

As a matter of fact, laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice.

A careful reading of the provisions contained in Order 22 CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination in an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the other similarly placed as long as their distinct and independent rights to property or any claim remain intact and not lost forever due to the death of one or the other in the proceedings. It has been held

by the Hon'ble Apex Court in ***Sardar Amarjit Singh Kalra vs Pramod Gupta*** (2000)3 SCC 272 that the provisions contained in Order 22 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice.

Since the original plaintiff had died on 31.1.1998, the suit stood automatically abated on the expiry of 150 days and it could not have been proceeded further unless the prayer for setting aside abatement was set aside and a proper application condoning the delay was also moved. It has been held in paras 7 and 8 in ***Jatav Panchayat Committee and another*** versus ***VIIth Additional District Judge, Etawah and others***, AIR 2000 Allahabad 253:

> "7. So far as the question of filing an application under Section 5 of the Limitation Act is concerned, Art. 120 of the Limitation Act provide that unless the application for substitution is made within 90 days from the date of death, the suit abates. Such abatement can be set aside within 60 days after the expiry of 90 days. Thus, an application made after

90 days from the date of death, is an application for substitution upon setting aside abatement. The prayer for abatement being made within the period of limitation, the substitution would be made only after setting aside the abatement and, therefore, no application explaining the delay would be necessary if such application is made with a prayer for setting aside the abatement within 150 days from the date of death. Thus, the contention of Mr. Misra with regard to the necessity of filing application under S.5 of the Limitation Act, cannot be acceded to.

8. But at the same time the said application cannot be maintained without the prayer for setting aside abatement. If such application for setting aside abatement is made after 150 days in that event definitely an application under S.5 of the Limitation Act would be necessary. Inasmuch as in the said case the period of limitation for setting aside abatement would also expire

> after expiry of 150 days from the date of death necessitating explanation of the delay and the condonation thereof by means of filing an application under S.5 of the Limitation Act."

In the instant case though a separate application under Section 5 of the Limitation Act was not moved yet, the sufficient cause to condone the delay has been pleaded in paras 3 and 4 of the application under Order 22 Rule 3 and 9 of the Code of civil Procedure. In the instant case the deceased had died on 31.1.1998 and the application, for bringing on record the legal representatives, was moved by his son Manoj kumar on 24.9.1998 i.e. after 86 days period of limitation. A perusal of the evidence recorded before the trial court shows that the applicant Manoj Kumar was recruited in the Army on 28.8.1995, and he came to know on 23.9.1998 about the pendency of case from Dina Nath and Jai Singh (Taya) when he came on annual leave. They called him to Sadyani. On 24.9.1998 he moved the application. His statement was tried to be countered by examining defendant Dhandev. According to Dhandev (RW-1), the suit was filed by the father of the applicant before he was recruited in the Army and during the

conciliation in the suit, the applicant was also present but he did not give any date it was essential as the applicant was serving in the army. The trial court had disbelieved the version of the applicant whereas on reappraisal of the evidence the learned District Judge set aside the findings of the trial court by a reasoned and detailed judgment duly supported by law.

The applicant would not have gained anything by filing the application at a belated stage and he had moved the application pleading "sufficient cause" which has been discussed in detail by the first Appellate court. The impugned order passed by the first Appellate Court is reasonable and legally correct, hence sustainable. Therefore, for the above reasons the revision petition is dismissed. The respondent be brought on record as the Legal representative of deceased-plaintiff.

Since the suit pertains to the year 1995 and issues stand framed, therefore, the trial court is expected to dispose of the matter within a period of six months from today.

The parties are directed to appear before the trial court on 31.08.2007. The Registry is

directed to send the records of the trial court forthwith, so as to reach there well in time, without any undue delay.

August 6, 2007 (Surinder Singh),J.
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